

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

**Amarillo, Texas**

**SOUTHWESTERN PUBLIC SERVICE  
COMPANY**

**Employer/Petitioner**

**and**

**Case No. 16-UC-201**

**INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS, LOCAL 602**

**Union**

**DECISION AND ORDER DISMISSING PETITION**

The Petitioner, Southwestern Public Service Company, is a public utility located in Amarillo, Texas, where it produces and distributes electricity in the States of Texas, Oklahoma, New Mexico and Kansas.

The Petitioner filed a unit clarification petition under Section 9(a) of the National Labor Relations Act, and a hearing was held before a Hearing Officer of the National Labor Relations Board. Both parties filed briefs with me<sup>1</sup>.

The Petitioner seeks to clarify the existing bargaining unit to exclude the system operator positions. These positions include system transmission operators and system control area

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<sup>1</sup> The briefs submitted by both parties were duly considered. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Petitioner is engaged in commerce as

operators. The Petitioner urges the clarification of the unit on the basis that the system operators possess Section 2(11) supervisory status because they assign and responsibly direct employees while using independent judgment. The Union opposes the clarification and argues that the system operators are not supervisors as defined in Section 2(11) of the Act. Further, the Union urges that the Petition be dismissed as untimely because the parties entered into a collective bargaining agreement shortly before the filing of the unit clarification petition.

Upon careful consideration of the record, I find that the Petition was timely filed and that the system operators are not supervisors as defined in Section 2(11) of the Act. Therefore, the Petition is dismissed.

### **HISTORY**

The Union and Petitioner have had a collective bargaining relationship since the 1940s. The system operators have been included in the bargaining unit since about 1983. Prior to that time, the bargaining unit included an employee classification of load control operators, which performed similar tasks to those of the system operators. The parties agreed to include the system operators in the bargaining unit. Therefore, the Board did not make a finding concerning the appropriateness of including the system operators in the bargaining unit.

### **THE PETITION IS TIMELY FILED**

The Petitioner and Union began their first round of negotiations for the current contract in about April 2002 and concluded those negotiations in about August 2002. The parties met again in October 2002. These negotiations resulted in the parties reaching a tentative agreement. The agreement was ratified on November 23, 2002. The unit clarification petition

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defined by the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The Union is a

was filed on February 27, 2003. The parties signed the contract in about March or April 2003, effective November 1, 2002.

Neither party disputes that Petitioner informed the Union of its intention to file a unit clarification petition on many occasions and that the parties discussed the removal of the system operators at a break during a bargaining session. The parties also do not dispute that Petitioner advised the Union that it intended to file a unit clarification petition.

Although the evidence shows that Petitioner never advanced a specific contractual proposal to remove the system operators from the bargaining unit, the record reflects that Petitioner advised the Union both verbally and in writing of its intention. As support, Petitioner provided two documents. The first document was a grievance settlement proposal<sup>2</sup> dated April 26, 2002, which stated, in pertinent part, as follows:

In order to attempt to resolve this grievance the Company is requesting to meet with the Union in negotiations over the issues at hand. The Company will agree not to file the UC-Unit Clarification Petition pertaining to the System Dispatching Operators until after these discussions take place. We would also request that the Union and Company put grievance #SPS 021102 on hold until after negotiations.

The second document was another proposed settlement for the grievance and stated in pertinent part:

The Company agrees not to file a UC petition for the System Operator Dispatcher Department within Southwester[n] Public Service with the National Labor Relations Board from the signing of this agreement until December 31, 2002, and the Union agrees not to utilize this proposal and/or agreement in the future should the Company take such action.

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labor organization within the meaning of the Act.

<sup>2</sup> The grievance concerned the alleged removal of work from the system operators.

The Union took the settlement proposal to the membership to ratify, which the membership declined to do. After the members failed to ratify the settlement, Petitioner notified then-union business representative William Pate that it would file a unit clarification petition.

Although the Board will not generally entertain a unit clarification during the term of a collective bargaining agreement<sup>3</sup>, it will entertain such a petition if the petitioner reserved its right to file during the course of bargaining. *Wallace-Murray Corp.*, 192 NLRB 1090 (1971); *Edison Sault Electric Co.*, 313 NLRB 753 (1994). The evidence is not disputed that Petitioner informed the Union that it believed the system operators were supervisors under the Act, asked the Union to agree to remove them from the unit and advised the Union that it would file a unit clarification petition.

On brief, the Union relied on cases such as *Edison Sault*, *supra* and *Wallace-Murray*, *supra* to argue that the petition was untimely filed. The Union's reliance on *Edison Sault* and *Wallace-Murray* is misplaced, as those cases are clearly distinguishable from the instant case. Unlike the instant case where the Petitioner raised the issue before, during and after the period of time when negotiations were held, the petitioner in *Edison Sault* did not raise the issue of a unit clarification until after the contract was ratified. *Edison Sault Electric Co.*, 313 NLRB at 753. Similarly, the petitioner in *Wallace-Murray Corp.* delayed until "midway during the term of the current agreement" to seek exclusion of certain employees. *Wallace-Murray Corp.*, 199 NLRB at 1090.

Although as a general rule, the Board will not entertain a unit clarification petition:

...where a position or classification has historically been excluded from or included in the unit, and there have not been recent, substantial changes that

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<sup>3</sup> *Union Electric Co.*, 217 NLRB 666, 667 (1975); *Batesville Casket Company*, 283 NLRB 795, 797 (1987).

would call into question the placement of the employees in the unit, the Board generally will not entertain a petition to clarify the status of the position or clarification regardless of when in the bargaining cycle the petition is filed ... the Board will clarify a unit to exclude a position or classification that has historically been included in the unit where the petitioner has established a statutory basis for the exclusion (e.g. that the individuals are statutory supervisors). In those situations, the only issue as to whether the Board will entertain the petition is whether it is filed at the appropriate time.

*Bethlehem Steel Corp.*, 329 NLRB 243, fn. 5 (1999).

Therefore, I find that the petition was timely filed and will not dismiss the Petition on that basis.

### **SYSTEM OPERATORS ARE NOT SUPERVISORS AS DEFINED IN THE ACT**

The party asserting supervisory status has the burden of proving that status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 167 LRRM 2164 (2001). For the reasons stated below, I find that Petitioner has not met its burden to show that the system operators are supervisors as defined in Section 2(11)<sup>4</sup> of the Act as they do not assign or responsibly direct employees while using independent judgment.

Neither party disputes that the system operators do not possess the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline other employees or adjust their grievances. The Petitioner argues that because the system operators use independent judgment to assign and to responsibly direct the work of other employees, they are supervisors as defined in Section 2(11) of the Act.

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<sup>4</sup> Section 2(11) of the Act defines a supervisor as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such

### **System Operators**

System operators work at the Petitioner's control center located in Amarillo, Texas. They are on duty 24 hours a day, 365 days a year. From the hours of 8:00 a.m. to 5:00 p.m., Monday through Friday the system operators work in the presence of a supervisor. When the system operators work outside the presence of a supervisor, the supervisor's name and number is posted so they can call with questions. Two system operators are always present and they work rotating shifts of 10 days on and four days off. If a problem arises after hours, the system operators determine if the situation requires immediate attention.

System operators work in Petitioner's control center. The control center performs two functions: transmission operation function and control area function. The Petitioner employs 14 employees as system operators. Ten of the 14 employees are System Operator "A"s (which are also known as system transmission operators and work in the transmission operation) and the remaining four employees are System Operator "B"s (which are also known as system control area operators and work in the control area operation). The System Operator "A"s are qualified to work both the transmission desk and the control area desk. The System Operator "B"s are qualified to work only one desk.

Many of the system operator responsibilities are dictated by the North American Electric Reliability Council (NERC) manual, which lists certain requirements for the industry and mandates that an electric utility must "ensure control area operators have clear authority in emergencies".

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action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical

System operators may call field employees to work overtime without consulting management. The system operator will call the distribution dispatch to locate a field employee and if the distribution dispatch is too busy, the system operators will call a local manager. If the system operators cannot find a local manager, the system transmission operator will call the field employee. The parties' collective bargaining agreement includes provisions concerning overtime, including a procedure for calling out employees for overtime. Petitioner maintains a list of employees and overtime earned, but the record is unclear as to whether the system operators have access to the list. The system operator determines whether additional employees should to be called out, but does not request a particular employee.

Although the system operators have much responsibility after hours, they will call the supervisor in certain circumstances. The system operators will call the supervisor to report when lines are locked out. If overtime is needed, the system operator tells the plant supervisor that the unit must be brought back on line and will ask the plant supervisor to do whatever is necessary to get that unit on line. The plant supervisor determines the actions to take to get the unit back on line.

The system operators draft switching procedures using a set of "battle plans" that are available for each of Petitioner's lines, but these plans may be varied from when the line is already "under a clearance and is isolated or has some switching done on it." In those instances, the system operator calls a supervisor.

When field equipment breaks and needs immediate repair, the system transmission operators may have field employees called out to work overtime and make the repairs.

However, the authority to determine the number of employees to be called to make repairs resides with the repair employee supervisor. The system operators do not instruct the field personnel how to perform repairs, but will tell the field personnel which switches to operate.

### **System Transmission Operator**

System transmission operators have four primary areas of responsibility. They oversee the transmission system by adjusting and monitoring voltage and by responding to alarms. They also direct switching to isolate equipment for maintenance and construction and restore transmission systems in the event of a failure.

#### ***1. Day-to-Day Oversight of the Transmission System***

System transmission operators conduct routine operational activities such as monitoring voltage, predicting system conditions and determining the actions to be taken to keep ahead of voltage changes by establishing and executing routine operating procedures. They also activate breakers by remote control in order to control the voltage, or they call control room operators (who are bargaining unit employees) who work in the power plants and instruct them to adjust output to control voltage. If there is a multi-unit power plant, the system transmission operators tell the control room operators which unit to deal with. When discussing the plans with the control room operators, the system transmission operators examine the system conditions and predict what those conditions will be in order to control voltage.

The system transmission operators also respond to alarms, which occur when the status of voltage, power flows and equipment exceed preset values. The system transmission operators evaluate the alarm and determine if the situation requires immediate response. If the



alarm requires immediate response, a system transmission operator may resolve the problem himself or arrange to have a field employee correct it.

System transmission operators may instruct Petitioner's energy markets (sales) personnel to bring a certain generator on line to support voltage. They exercise this authority without managerial approval.

As part of the day-to-day operations, system transmission operators also shed load (which is the turning off of electricity to retail customers, houses and businesses) without obtaining managerial approval. They shed load by remote control (by using the SCADA computer system and selecting a breaker and issuing the "open" command) or by having field employees perform the disconnecting. When field employees are shedding load, the system transmission operators tell them which devices to operate or how much load needs to be shed.

## **2.     *Switching Operations***

System transmission operators are also responsible for switching, which is the opening and closing of switching devices to energize or de-energize sections of the system control power flow or isolate equipment or to protect the public, if a piece of equipment is energized and exposed to the public.

System transmission operators develop the switching procedures by listing the necessary steps, by arranging for the switchmen to be in place at the correct time and by determining whether the conditions will allow the switching to be performed at that time. They may draft switching procedures without supervisory approval, although supervisors have reviewed some switching procedures. When a switching order becomes necessary after 5 p.m.,

one system transmission operator will draft the switching order and another will review it for accuracy.

System transmission operators tell the switchmen the switching steps to perform and make a record as each step is performed. If a field employee is confused about a procedure, the system transmission operator may stop the process to verify that the field employee understands, assign another field employee to perform the work or cancel the project. If the field employee and the system transmission operator disagree about the propriety of performing a certain procedure, the system operator will refer the matter to a supervisor.

System transmission operators draft switching orders that coordinate field employees from different locations to perform the switching operations. System transmission operators determine the order of the steps taken to perform the switching function. Although a supervisor routinely reviews a switching procedure developed by the system transmission operator, the system transmission operator may proceed without such approval when necessary.

When drafting switching orders, system transmission operators use a Request for Outage. The Request for Outage is a computer-based system that contains menus from which the system transmission operators select steps to create a switching procedure. When determining what switching needs to be performed, the system transmission operators consult maps that show the substations, lines, conductor sizes, voltages of certain equipment, number of switches, locations of switches, transformers and locations of transformers. As referenced above, the system transmission operators use a set of “battle plans” which may be varied under certain circumstances.

When the system transmission operators perform remote control switching, they utilize the SCADA computer system, but the SCADA system does not tell the system transmission operator which switch needs to be opened.

When performing switching operations, the system transmission operators may, without calling management, have employees called to work overtime.

### **3. *Restoration Plans for Blackouts***

The system transmission operators establish and execute emergency operating procedures and restoration plans for blackouts. Although Petitioner has a plan for attacking emergency situations, the plan is used as a starting point for the system transmission operators who complete the restoration using their judgment and knowledge.

During a blackout in 1996, the system transmission operators coordinated the restoration efforts by instructing the power plant personnel to perform certain tasks, by telling field personnel where to go and what switches to operate to restore the system.

### **System Control Area Operator**

The system control area operators are responsible for the operations of the Petitioner's control area and coordinate short-term unit maintenance. They monitor the generation in the transmission system to ensure operational status. The system control area operators also direct power plant personnel when power plants enter or leave the system.

They are also responsible for emergency operations, act to restore power and are responsible for switching.

## ***1. Operations of the Control Center***

System control area operators monitor the generation system to ensure adequate resources. They activate the reserve-sharing pool to replace lost generators and approve and implement energy purchase or sales transactions for power flow to and from neighboring utilities.

System control area operators perform these functions by reviewing the status of the generators and the tie line flows to measure the balance between the load and the generation. They examine the outputs of all the power plants to keep abreast of the reserve numbers. They review the energy transactions requested by Energy Markets or other power traders and have authority to review or deny a particular transaction. If the system control area operator approves the transaction, he loads the information into the control system and the control system will move the power plants to complete the transaction.

The system control area operators possess the authority to approve or decline requests to take generation units off line and do not need managerial approval to do so. They also possess the authority to choose the type of fuel burned by the generating units (that can burn more than one type of fuel) and they may instruct those plants to switch fuel without securing managerial approval.

They also have the authority to interrupt power to customers and do so by activating breakers by remote control or by instructing field personnel to do so. They do not need to secure management approval before doing so.

In addition, the system control area operators possess the authority to order emergency start-ups of generators and may order such start-ups without managerial approval. They also

have the authority to activate sharing agreements, which are agreements to share available generation resources to respond when a power plant breaks down. System control area operators exercise the authority to activate sharing agreements on a routine basis and do not need managerial approval to do so.

## **2.     *Restoration of Power***

Like the system transmission operators, the system control area operators communicate with field employees when directing the control area functions and when establishing and executing routine and emergency operating procedures and restoration plans for facilities.

System control area operators act in emergency situations. In February 2003, multiple generators failed within minutes of each other. In that instance, system control area operators told energy markets personnel that the system control area operations was taking total control of the generation system and worked with the power plants and the power pool to get the system functioning properly. During this crisis, system control area operators told power plant employees how to run their generators.

## **3.     *Switching Operations and Repairs***

Like the system transmission operators, the system control area operators also draft switching procedures and direct and approve switching for maintenance and repairs. The record reflects that a system control area operator drafted a switching procedure for power plant isolation, faxed the procedure to energy markets and to the power plant, and worked with power plant personnel to perform the switching operation. When performing a switching operation, system control area operators may work with bargaining unit employees such as a

plant operator or a plant supervisor. If a switching order requires that relay settings be considered, an electrical engineer will review the switching order.

When repair work is performed, system control area operators tell the field personnel which switches to operate, but do not instruct the personnel how to perform the repairs.

### **ANALYSIS**

Respondent urges that I order the clarification of the unit to exclude the system operators from the existing bargaining unit because they are supervisors within the meaning of Section 2(11) of the Act. As noted above, Respondent bears the burden of establishing that system operators are supervisors as defined in the Act. *NLRB v. Kentucky River Community Care, Inc.*, *supra*. The Board does not construe supervisory status too broadly because:

Supervisory status determinations carry important consequences for workers whose status is in question....Thus when a worker is found to be a “supervisor” under the Act, she is excluded from the NLRB’s collective bargaining protections. In light of this, the Board must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organizational rights.

*Mississippi Power* 328 NLRB at 972 [citing *East Village Nursing & Rehabilitation Center v. NLRB*, 165 F.3d 960, 962 (D.C. Cir. 1999).]

### ***Assignment of Employees***

Although Petitioner urges that system operators assign employees using independent judgment, the record shows that the system operators do not identify the employees to be called, do not specify the number of employees needed, and do not call the employees directly unless the distribution dispatch employees or the field employees’ supervisor is unable to do so.

Therefore, I find that, to the extent the system operators assign employees, they do not use independent judgment and are not supervisors as defined by the Act on that basis.

***Responsibly Direct Employees***

Petitioner urges that I reject *Mississippi Power & Light Co.*, 328 NLRB 965 (1999), in making a determination in this case. Instead of applying *Mississippi Power & Light Co.*, Petitioner argues that I apply *Big Rivers Electric Co.*, 266 NLRB 380 (1983), which the Board expressly overruled in *Mississippi Power*, 328 NLRB at 965. As support, Petitioner points to *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001) wherein the Court rejected the Board's view that "employees do not use 'independent judgment' when they exercise ordinary professional or technical judgment in directing less-skilled employees"<sup>5</sup> and argues that I should reject the Board's ruling in *Mississippi Power* because it held that "exercise of judgment pursuant to an employee's professional, technical or experienced special knowledge or expertise does not translate into supervisory status." *Mississippi Power*, 328 NLRB at 973.

The employer in *Mississippi Power* is an electrical power utility like Petitioner. The *Mississippi Power* distribution dispatchers perform planned switching and handle emergency outages, which is similar to work performed by Petitioner's system operators. When performing their work, the *Mississippi Power* distribution dispatchers use the SCADA computer system and maps just as the system operators in the instant case do. Both may also call out additional personnel. The *Mississippi Power* employer also employed system

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<sup>5</sup> 532 U.S. at 713.

dispatchers whose job duties are akin to Petitioner's system transmission operators in that they monitor the transmission system, respond to emergencies and restore service.

Petitioner also points to *Entergy Gulf States*<sup>6</sup>, as support. In *Entergy*, the Court denied enforcement of a Board order and held that the Board had no reasonable basis for overruling *Big Rivers*. Petitioner's reliance on *Entergy* is misplaced, as the operations coordinators in *Entergy* had greater supervisory authority than Petitioner's system operators. The *Entergy* operations coordinators had the authority to independently decide whether to open an area office, to determine how many employees to call on duty and to move field workers between jobs. In addition, the *Entergy* field employees' call-in shifts did not end until the operations coordinators released them. The record fails to establish that Petitioner's system operators have similar authority. As the Court explained:

To direct other workers responsibly, a supervisor must be "answerable for the discharge of a duty or obligation" or accountable for the work product of the employees he directs.

*Entergy Gulf States*, 253 F.3d at 209 [citing *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1278 (5<sup>th</sup> Cir. 1986).] The record is silent on the issue of any accountability on the part of the system operators during their interaction with other bargaining unit employees.

The *Entergy* court also acknowledged "routine technical commands executed by technical personnel do not indicate supervisory authority." *Entergy*, 253 F.3d at 209 [citing *NLRB v. KDFW-TV, Inc.*, 790 F.2d at 1278.] Although the tasks outlined in the system operators' plans are communicated to field personnel, they are routine technical plans which amount to what switch to operate and when. The communication of those plans (which are

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<sup>6</sup> 253 F.3d. 203 (5<sup>th</sup> Cir. 2001).



devised from Petitioner’s “battle plans”) do not bestow supervisory authority on the system operators.

Indeed, the Board has long held that “mere communication of complex schemata does not compel a finding of supervisory independent judgment.” *Mississippi River*, 328 NLRB at 974 [citing *NLRB v. Security Guard Service*, 384 F.2d 143, 151 (5<sup>th</sup> Cir. 1957).] The fact that Petitioner’s system operators communicate plans such as switching orders does not elevate their status to supervisory.

Moreover, the fact that an employee may “direct others in work that may be complex and potentially dangerous is not enough to elevate an employee to supervisory status.” *Mississippi River*, 328 NLRB at 970 [citing *Cooper /T. Smith, Inc. v. NLRB*, 177 F.3d 1259 (11<sup>th</sup> Cir. 1999).]

Although the Supreme Court in *Kentucky River* rejected the Board’s finding that employees do not use independent judgment under Section 2(11) when they exercise “ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards”<sup>7</sup>, the Court reemphasized the basic test for finding supervisory status as well as allocating the burden to the party which claims that certain employees enjoy supervisory status. The basic test is three-fold: (1) the exercise of the 12 listed supervisory functions; (2) the use of independent judgment; and (3) the holding of their authority in the employer’s interest.

In the instant case, the record does not support a finding that the system operators used independent judgment when assigning or directing employees. The system operators

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<sup>7</sup> 532 U.S. at 713.

draft plans such as switching orders by working from a set of battle plans. If the system operator deems it necessary to call in employees, he will attempt to

have the distribution dispatch employees call the employees. If the distribution dispatch employees are unable to call the employees, then the field employee supervisor will call them. The system operator will call the field employees only if the distribution dispatch employees and the field employees' supervisor are unable to do so. Although the system operator may state that employees are necessary at a certain location, the system operator does not dictate the identity of the employees to be called or the number of employees. These actions do not require the use of independent judgment.

Petitioner presented testimony that the system operators use their experience and judgment in performing their tasks. It is well settled that conclusionary statements of a witness, without supporting evidence, are insufficient to establish supervisory authority. *American Radiator Corp.*, 119 NLRB 1715, 1718 (1958). Although Petitioner presented NERC guidelines, which contain language that a system operator is to have authority to take appropriate actions, and has authority to act in emergency situations, neither the NERC guidelines, nor the record as a whole establish that the system operators perform their tasks using independent judgment.

## **ORDER**

**IT IS HEREBY ORDERED** that the Petition be dismissed.

## **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This

request must be received by the Board in Washington by 5:00 p.m. EST on September 24, 2003. This request may not be filed by facsimile transmission.

Dated at Fort Worth, Texas this 10<sup>th</sup> day of September 2003.

/s/ Curtis A. Wells  
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